

October 15, 1998

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Ex Parte Presentation

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magali Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-25

Dear Ms. Roman Salas:

The purpose of this letter is to respond to some specific questions and issues that were raised in discussions with Commission staff regarding the above captioned proceeding.

In response to one question raised in our discussions, all DBS operators currently carry PBS "Schedule X," which is the national feed, into unserved households. Attached are the pertinent pages from the Philips Satellite Transponder Guide providing the program line-up of the current DBS operators.

We understand the issue has been raised as to whether receipt of a license fee for certain programming disqualifies that programming from the set-aside provision. As discussed in detail on page 20 of our Comments dated April 28, 1997, we believe this would be an excessively narrow reading of the statute. The provision concerning "reasonable prices" is necessary to prevent price gouging that might defeat the purpose of the statute, but it does not follow that qualified entities are precluded from negotiating to obtain payment, if possible, to offset their programming costs, or at least to obtain free carriage. Any qualified entity that is able to negotiate such an arrangement would simply have no need to invoke the protection on maximum rates provided by section 25(b). The Commission's rules should not preclude any entity enumerated in the statutory language from qualifying under the set-aside. This would directly contravene Congressional intent set forth in specific statutory language.

We also understand that the issue of the appropriate interpretation of the term "editorial control" is still under consideration. We addressed this issue at length in a letter to Rebecca Arbogast dated December 16, 1997, which we have attached for your convenience.

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Thank you for your consideration of this additional input.

Respectfully submitted,

M. Mohrman-Gillis

Marilyn Mohrman-Gillis
Vice President, Policy
And Legal Affairs
Lonna Thompson
Director Legal Affairs
Association of America's
Public Television Stations

Greg Ferenbach

Greg Ferenbach
Senior Vice President and General Counsel
Public Broadcasting Service

Enclosure

Cc: Ari Fitzgerald
Helgi Walker
Jane Mago
Anita Wallgren
Rich Chessen

DBS

119° West Longitude

Estimated End of Life: January 2008



100	Dish-On-Demand Previews	234	WPIX-TV, New York	500	Dish-On-Demand PPV 1
101	Dish Network Promotions	236	WSBK-TV, Boston	501	Dish-On-Demand PPV 2
102	USA Network	238	WWOR-TV, New York	502	Dish-On-Demand PPV 3
104	Comedy Central	240	WGN-TV, Chicago	503	Dish-On-Demand PPV 4
106	Nick at Nite's TV Land	241	WNBC-TV, New York	504	Dish-On-Demand PPV 5
108	Lifetime	242	KNBC-TV, Los Angeles	505	Dish-On-Demand PPV 6
110	TV Food Network	243	WSEE-TV, Erie, PA	506	Dish-On-Demand PPV 7
112	Home & Garden Network	244	KPIX-TV, San Francisco	507	Dish-On-Demand PPV 8
114	E! Entertainment TV	245	WKRN-TV, Nashville	508	Dish-On-Demand PPV 9
116	Game Show Network	246	KOMO-TV, Seattle	509	Dish-On-Demand PPV 10
117	CBS Eye on People	247	FOXNet	551	Agcast
118	Arts & Entertainment	249	PBS	552	Signal
120	The History Channel	260	Trinity Broadcasting Network	600	RAI
122	Science Fiction Channel	261	Eternal Word Television	602	ART
124	BET		Network	604	Antenna One (Greek Programming)
129	Bravo	262	Angel One		TV 5 (French)
130	American Movie Classics	300	HBO East	606	
131*	Romance Classics	301	HBO2 East	608	TV Polonia
131*	Independent Film Channel	302	HBO3 East	615	RTP (Portuguese Programming)
132	Turner Classic Movies	303	HBO West	620	MTV: En Espanol
138	Turner Network Television	304	HBO2 West	626	Fox Sports Americas
140	ESPN Sports Network	305	HBO Family	628	Telemundo
142	ESPNes	310	Cinemax East	640	TV Japan
143	Classic Sports Network	311	Cinemax West	660	Radio France Internationale
144	ESPN 2	312	More Max	662	Polskie Radio Program 1
145	ESPN Alternate	318	Showtime East	663	Polskie Radio Program 3
146	ESPN 2 Alternate	319	Showtime West		
160	MTV: Music TV	320	Showtime 2 East		EchoStar Music:
161	M2	322	Showtime Extreme	950	CD1 New Country
162	VH1 Music First	327	The Movie Channel East	951	CD2 Country Classics
166	Country Music Television	328	The Movie Channel West	952	CD3 Country Currents
168	The Nashville Network	332	Sundance	953	CD4 Jukebox Gold
170	Nickelodeon (East)	333	Flix	954	CD5 70's Songbook
171	Nickelodeon (West)	340	Encore East	955	CD6 Adult Favorites
172	The Disney Channel (East)	350	Starz! East	956	CD7 Adult Contemporary
173	The Disney Channel (West)	351	Starz! 2 East	957	CD8 Adult Alternative
174	Toon Disney	401	The Golf Channel	958	CD9 Hot Hits
176	The Cartoon Network	412	Madison Square Garden	959	CD10 Classic Rock
178	The Learning Channel	413	Fox Sports New York	960	CD11 Modern Rock Alternative
180	The Family Channel	414	Fox Sports Rocky Mountain	961	CD12 Power Rock
182	The Discovery Channel	416	Fox Sports Southwest	962	CD13 Non-Stop Hip Hop
184	Animal Planet	417	Fox Sports West	963	CD14 Urban Beat
200	Cable News Network	418	Fox Sports Midwest	964	CD15 Latin Styles
202	Headline News	419	Fox Sports Bay Area	965	CD16 Fiesta Mexicana
204	Court TV	420	Fox Sports South	966	CD17 EuroStyle
206	CNN/CNNFN	421	Fox Sports Chicago	967	CD18 Jazz Traditions
207	Bloomberg Information Television	422	Sunshine Network	968	CD19 Contemporary Jazz Flavors
208	CNBC	423	Sports Channel Florida		
209	MSNBC	424	Home Team Sports	969	CD20 Americana
210	C-SPAN	425	Fox Sports Ohio	970	CD21 Contemporary Instrumentals
212	C-SPAN2	426	Fox Sports Northwest		
213	The NASA Channel	427	Fox Sports Cincinnati	971	CD22 Concert Classics
214	The Weather Channel	428	Fox Sports Pittsburgh	972	CD23 Light Classical
216	America's Voice	430	Fox Sports Detroit	973	CD24 Easy Instrumentals
220	The Travel Channel	432	Empire Sports Network	974	CD25 Big Band Era
222	Home Shopping Network	434	New England Sports Network	975	CD26 Contemporary Christian
226	QVC Shopping Network	435	Fox Sports New England	976	CD27 Kidtunes
230	TBS Super Station	436	Midwest Sports Channel	977	CD28 New Age
232	KTLA-TV, Los Angeles	497	Playboy	978	CD29 Blues
		499	Adultvision (PPV)	979	CD30 Reggae
				980	CD31 LDS Radio Network

Notes: Echostar 3 is located at 61.5°W and carries local channels and some other programming. Echostar 4 is located at 148°W and will be used for a Hawaii beam, programming yet to be determined. *Shared Channel

DBS 1/DBS 2/DBS 3

101.2° West Longitude/100.8° West Longitude/100.85° West Longitude

DBS (Ku/Ka-Band)—TWTa Power: 120 watts

Estimated End of Life: 2006

DBS 1, 2 and 3 are HS-601
three axis stabilized satellites.

Direct TV:

100	Direct Ticket Previews	267	Platinum Presents	402	Playboy TV
101-199	Direct Ticket Pay Per View Channels	268	Black Entertainment Television	500	Tune
200	Direct Ticket Previews	269	Much Music	501	Music Choice "Hit List"
202	Cable News Network	271	CSPAN	502	Music Choice "Dance"
203	Court TV	272	CSPAN 2	503	Music Choice "Rap"
204	CNN Headline News	274	Bloomberg Information Television	504	Music Choice "R&B Hits"
206	ESPN	275	CNBC	505	Music Choice "World Beat"
207	ESPNNews	276	MSNBC	506	Music Choice "Blues"
208	ESPN 2	277	The Weather Channel	507	Music Choice "Jazz"
211	Sports Schedule	278	Fox News Channel	508	Music Choice "Lite Jazz"
212	Turner Network Television	279	NewsWorld International	509	Music Choice "New Age"
213	Home Shopping Network	280	CBS Eye on People	510	Music Choice "Prog Album Mix"
214	Home & Garden Network	281	CNN International/CNNi	511	Music Choice "Alternate Rock"
215	TV Food Network	286	Trinity Broadcasting Network	512	Music Choice "Metal"
217	E! Entertainment Television	289	America's Health Network	513	Music Choice "Classic Rock"
218	Access Card Channel	290	WSEE-TV, Erie, PA (CBS)	514	Music Choice "The 80s Power Hits"
220	American Movie Classics	291	KPIX-TV, San Francisco, CA (CBS)	515	Music Choice "70s Super Hits"
221	Turner Classic Movies	292	WNBC-TV, New York, NY (NBC)	516	Music Choice "Solid Gold Oldies"
222	Romance Classics	293	KNBC-TV, Los Angeles, CA (NBC)	517	Music Choice "Soft Rock"
224	Direct Ticket Previews	294	PBSNet, PBS	518	Music Choice "Today's Country"
225	Starz! East	295	WKRN-TV, Nashville, TN (ABC)	519	Music Choice "Classic Country"
226	Starz! West	296	KOMO-TV, Seattle, WA (ABC)	520	Music Choice "Gospel"
227	Starz! 2 East	297	Foxnet	521	Music Choice "Easy Listening"
228	Starz! 2 West	300	Sports Offers	522	Music Choice "Big Band"
229	Platinum Presents	302	Sports Schedule	523	Music Choice "Singers & Standards"
230	Encore East "Hits"	304	The Golf Channel	524	Music Choice "Show Tunes"
231	Encore West "Hits"	305	Classic Sports Network	525	Music Choice "Lite Classical"
232	Encore 2 "Love Stories"	306	Speedvision	526	Music Choice "Classical Masterpieces"
233	Encore 3 "Westerns"	307	Outdoor Life	527	Music Choice "Contemporary Christian"
234	Encore 4 "Mystery"	308	Platinum Presents	528	Music Choice "For Kids Only"
235	Encore 5 "Action"	309	Fox Sports New England	529	Music Choice "Sounds of the Season"
236	Encore 6 "True Stories & Drama"	310	Madison Square Garden	530	Music Choice "Retro-Active"
237	Encore 7 "Wam"	311	New England Sports Network	531	Music Choice "Dixieland"
238	Bravo	312	Fox Sports New York		
239	Independent Film Channel	313	Empire Sports Network		
240	Arts & Entertainment	315	Fox Sports Pittsburgh		
241	The History Channel	316	Home Team Sports		
242	The Disney Channel East	317	Fox Sports South		
243	The Disney Channel West	318	Sunshine Network		
244	Toon Disney	319	Sportschannel Florida		
245	The Discovery Channel East	320	Fox Sports Detroit	899	USSB Information Channel
246	The Learning Channel	321	Fox Sports Ohio	900	Big1 Special Events
247	Cartoon Network	322	Fox Sports Cincinnati	905	Big2 Special Events
248	Animal Planet	323	Fox Sports Chicago	910	HBO East
249	Nickelodeon East	324	Midwest Sports Channel	911	HBO 2 East
250	Nickelodeon West	325	Fox Sports Southwest	912	HBO 3 East
251	Nick at Nite's TV Land	326	Fox Sports Rocky Mountain	913	HBO West
252	Lifetime	327	Fox Sports Midwest	914	HBO 2 West
253	USA Network	329	Fox Sports Arizona	916	HBO Family East
254	Sci-Fi Channel	330	Fox Sports Northwest	917	HBO Family West
255	Comedy Channel	331	Fox Sports West	918	Access Card Information
256	WGN/WB	332	Fox Sports West 2	920	Showtime East
257	The Game Show Network	333	Fox Sports Bay Area	921	Showtime 2 East
258	The Family Channel East	334-336	Sports Alternate	922	Showtime 3 East
259	TBS Superstation	337	Direct TV Sports Schedules	923	Showtime West
260	TRIO	338	NFL Barker Channel	925	Showtime Extreme
261	QVC	340-362	NFL Games	929	Flix
262	The Nashville Network	363-364	NBA Games	930	Cinemax East
263	Country Music Television	365-372	NHL Games	931	More Max
264	MTV Music Television	373-379	MLB Games	932	Cinemax West
265	M2 (MTV #2)	380	Sports Schedule	940	The Movie Channel East
266	VH-1 Video Hits 1	381-387	MLB Games	941	The Movie Channel West
		388-399	College Basketball & Football	945	Sundance
		400	Adult Specials	960	FXM Movies From Fox
		401	Spice	963	All News Channel
				999	USSB Information Channel

USSB:

899	USSB Information Channel
900	Big1 Special Events
905	Big2 Special Events
910	HBO East
911	HBO 2 East
912	HBO 3 East
913	HBO West
914	HBO 2 West
916	HBO Family East
917	HBO Family West
918	Access Card Information
920	Showtime East
921	Showtime 2 East
922	Showtime 3 East
923	Showtime West
925	Showtime Extreme
929	Flix
930	Cinemax East
931	More Max
932	Cinemax West
940	The Movie Channel East
941	The Movie Channel West
945	Sundance
960	FXM Movies From Fox
963	All News Channel
999	USSB Information Channel

T.B. 12198.50H T.B. 11702.0 H
T.B. 12196.50V

GE GE-2 (Ku-Band)

85° West Longitude

Ku-Band—TWTA Power: 60 watts @ 36 MHz

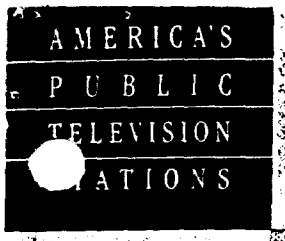
Estimated End of Life: January 2014

*PrimeStar Programming

GE-2 is a LM Astro Space
2100 3 axis stabilized satellite.

Ku-Band

1	Primeview One	93	Home & Garden TV	196	Fox Sports Arizona
2	Preview 1	99	Preview 2 (Movies)	197	Fox Sports Northwest
3	Headline News	100	HBO	198	Fox Sports West
4	CNN	101	HBO 2	199	Fox Sports Bay Area
5	CNN SI	102	HBO 3	211	Sports Plus 1
6	CNNFN	103	HBO Family West	212	Sports Plus 2
7	ESPNews	105	Showtime East	213	Sports Plus 3
8	CNBC	106	Showtime 2 West	214	Sports Plus 4
9	MSNBC	107	Showtime 3 East	215	Sports Plus 5
10	Northeast Weather	108	Starz! East	288	Preview 5 (Spanish)
11	Mid Atlantic Weather	109	Starz! 2 West	289	Univision
12	Southeast Weather	110	Encore	290	The Cartoon Network Spanish
13	Midwest Weather	111	Encore 3 Westerns	291	The Family Channel Spanish
14	South Central Weather	112	Encore 4 Mystery	292	HBO Espanol
15	Central Weather	114	Cinemax	293	HBO 2 Espanol
16	North Plains Weather	115	More Max	294	HBO 3 Espanol
17	Four Corners Weather	117	Sundance	295	HBO Family Espanol
18	Southwest Weather	118	Independent Film Channel	296	Showtime Espanol
19	Northwest Weather	119	Turner Classic Movies	297	Starz! Spanish
20	C-Span 1 (House)	120	American Movie Classics	298	Encore Spanish
21	C-Span 2 (Senate)	121	Romance Classics	299	Cinemax Espanol
22	Court TV	122	Preview 3 (Primecinema & Playboy)	300	More Max Espanol
23	The Weather Channel				
33	WBS-TV, Atlanta (ABC)	123	Primecinema Today		Prime Audio by DMX:
34	KABC-TV, Los Angeles (ABC)	124	Primecinema 1	311	Symphonic
35	WUSA-TV, Washington, DC (CBS)	125	Primecinema 2	312	Bluegrass
36	KOIN-TV, Portland, OR (CBS)	126	Primecinema 3	313	Children's
37	WHDH-TV, Boston (NBC)	127	Primecinema 4	314	Christian Inspirational
38	KCRA-TV, Sacramento (NBC)	128	Primecinema 5	315	Gospel
39	WTXF-TV, Philadelphia (Fox)	129	Primecinema 6	316	Contemporary Christian
40	KTVU-TV, Oakland (Fox)	130	Primecinema 7	317	Hottest Hits
41	PBS National	131	Primecinema 8	318	Alternative
42	WGN-TV, Chicago (WB)	132	Primecinema 9	319	80s Oldies
43	TBS Superstation, Atlanta (Ind.)	133	Primecinema 10	320	Album Rock
44	Arts & Entertainment	135	Primecinema 12	321	Adult Contemporary
45	USA Network	136	Primecinema 13	322	Contemporary Instrumentals
46	Turner Network Television	137	Primecinema 14	323	Soft Hits
47	TV Land	143	Playboy Television	324	Blues
48	Comedy Central	166	Preview 4 (Sports)	325	Traditional Country
49	The Nashville Network	167	ESPN	326	Classic Jazz
50	BET	168	ESPNews	327	Modern Country
51	QVC Shopping Network	169	Classic Sports Network	328	Lite Classical
52	E! Entertainment Television	170	ESPN 2	329	Lite Jazz
53	The Game Show Network	173	CNN SI	330	Folk Music
54	CBS Eye on People	174	Outdoor Life	331	70s Oldies
56	VH-1	175	Speedvision	332	Classic Rock
57	MTV	176	The Golf Channel	333	Rock 'n Roll Oldies
58	Country Music Television	177	New England Sports Network	334	Big Band/Swing
59	Much Music	178	Fox Sports New England	335	Golden Oldies
70	M2	179	Madison Square Garden	336	Classic R&B
77	Nickelodeon/Nick at Night	180	Fox Sports New York	337	Urban Adult Contemporary
78	The Cartoon Network	181	Empire Sports Network	338	Urban Beat
79	The Disney Channel East	183	Home Team Sports	339	Latin Contemporary
80	The Disney Channel West	184	Fox Sports South	340	Salsa
81	Lifetime	185	Sunshine		
82	The Family Channel	186	Sportschannel Florida	401	TV Japan (English)
83	Sci-Fi Channel	187	Fox Sports Pittsburgh	402	TV Japan (Japanese)
84	Odyssey	188	Fox Sports Detroit	403	TPN Success Channel
85	Trinity Broadcasting	189	Fox Sports Midwest	500	Preview 4 (Sports)
86	HBO Family West	190	Fox Sports Ohio	501-554	NBA League Pass
88	The Discovery Channel	191	Fox Sports Cincinnati	555	Preview 4 (Sports)
89	The Learning Channel	192	Fox Sports Chicago	556-599	NHLCenter Ice
90	Animal Planet	193	Midwest Sports Channel	655	Preview 4 (Sports)
91	The History Channel	194	Fox Sports Rocky Mountain	656-699	MLB Extra Innings
92	TV Food Network	195	Fox Sports Southwest		



DUPLICATE ORIGINAL



RECEIVED

DEC 16 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 16, 1997

BY MESSENGER

Ex Parte Presentation

Ms. Rebecca Arbogast
Senior Legal Advisor
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Washington, D.C. 20554

**Re: MM Docket No. 93-25, Implementation of Section 25 of the Cable
Television Consumer Protection and Competition Act of 1992**

Dear Rebecca:

At our meeting on December 3, 1997, we discussed the issue of whether the Commission should import aspects of the cable leased access scheme into the regulations it promulgates under the DBS provisions of the 1992 Cable Act. We are submitting this filing to further clarify our position on this issue. Time Warner and other cable operators argue that the entire leased access regime should be imposed on DBS providers so that DBS will be subject to the identical regulatory burdens Congress has imposed on cable. Other commenters argue that the Commission should borrow from the cable leased access scheme by imposing a "first come, first served" principle of allocation for programmers seeking access to the DBS set-aside capacity. These suggestions are misguided and should be rejected.

There is no basis for importing the cable leased access scheme into the Commission's regulation of DBS. Cable and DBS are very different technologies. Most obviously, DBS has a national audience, while cable is an inherently local service. The DBS industry is composed of several large, nationwide companies, while thousands of local cable systems serve communities around the country. Congress plainly understood that it was inappropriate simply to graft cable laws and regulations onto DBS; the statutory provisions governing cable and DBS are obviously quite different on their face. In the 1992 Cable Act, Congress gave the Commission authority to fashion a regulatory scheme tailored to the new and unique DBS technology.

Certainly there is no indication that Congress wished to apply the cable leased access model to DBS. The legislative history of the 1992 Cable Act indicates that Congress perceived then that the cable leased access provisions, originally enacted in 1984, had largely been a failure.¹ Nothing in the legislative history of the DBS provisions suggests that Congress saw the DBS set-aside as similar to cable leased access. The portions of the legislative history relating to the DBS provisions do not even refer to the cable leased access scheme.

It is true that the DBS provisions include a sentence stating that DBS providers are barred from exercising editorial control over video programming provided for the set-aside capacity and that there is similar language in the cable leased access statute. This does not mean that the Commission should assume Congress intended the FCC to apply the two provisions in the same way. In the first place, there is a significant difference in the language of the two provisions. That difference suggests that the "editorial control" sentence in the DBS statute has a narrower scope than the provision in the cable leased access statute.²

The term "editorial control" can have different meanings in different contexts. In some contexts, the term refers merely to control over the content of programming (e.g., the ability to modify a program), not to control over which programmers will have access to particular capacity. In the television business, it is

¹ See, e.g., S. Rep. No. 102-92, 102d Cong., 1st Sess. 30 (1991) ("[the cable leased access] provision has hardly been used"). See also id. (quoting statement of Preston Padden) ("Unfortunately, [the leased access] section of the Act has proven to be absolutely useless in seeking to advance the objectives of assuring consumers access to the widest possible variety of video sources and services.").

² The provision in the cable leased access statute is considerably broader than the sentence in the DBS statute. A cable operator not only may not exercise editorial control over video programming provided pursuant to the leased access statute; it may not "in any other way consider the content of such programming," except for the purpose of establishing a reasonable price for the use of the leased capacity. 47 U.S.C. § 632(c)(2). The DBS statute does not contain the "in any other way" phrase.

It is likely that Congress inserted the "in any other way" language to make clear that a cable operator is barred not just from altering the content of programming provided for the leased capacity, but also from choosing among programmers based on the content of their programming (except for pricing purposes).

common for program distribution agreements to contain "no editing" covenants, under which the distributor agrees not to alter the content of programming made available to it under the agreement.³ In this context, the restriction obviously refers to control over the content of the programming itself, not the selection of programmers.⁴ It is certainly not unreasonable to conclude that Congress referred to this narrower meaning of editorial control in the DBS statute and did not intend to dictate a "first come, first served" approach to selection of programmers. Congress may also have been trying to prevent DBS providers from unduly influencing the content of noncommercial programming where such programming is produced through joint ventures or co-production arrangements.

Neither the DBS statute itself nor its legislative history indicates that the "no editorial control" sentence in the DBS statute refers to a "first come, first served" principle of allocation for the set-aside capacity.⁵ In fact, the DBS legislative history

³ PBS routinely includes such "no editing" covenants in the program distribution agreements it enters into with DBS providers, just as the producers of PBS programs insist on the same clause from PBS.

⁴ In addition, dictionary definitions of the term "edit" suggest that the term "editorial control" can have several different meanings. Thus, "edit" can mean not only to "select and compile," but also to "emend" or "revise" and "to alter, adapt, or refine." Webster's Third New International Dictionary of the English Language Unabridged 723 (1993). The Commission itself has used the term "editorial control" in the sense of revision, rather than selection. See, e.g., In the Matter of Closed Captioning and Video Description of Video Programming: Report and Order, MM Docket No. 95-176 (released Aug. 22, 1997), at ¶ 18 (noting that video programming distributors "will not be responsible for the captioning of programming that is not subject to their editorial control").

⁵ In this respect, the DBS legislative history differs from the history of both the cable leased access statute and the public, educational, or governmental ("PEG") use provisions. The 1984 House report on the cable leased access legislation contains several paragraphs emphasizing that cable operators are not to consider the content of a programming service eligible to use the leased capacity except in connection with establishing the price for the capacity. H. R. Rep. No. 98-934, 98th Cong. 2d Sess. 51-52 (1984). The legislative history of the DBS statute contains no discussion of this sort. The 1984 House report also refers to public access ("PEG") channels as the "video equivalent of the speaker's soap box" and "available to all." Id. at 36. The legislative history of the DBS provisions contains no such characterizations. This is perhaps

suggests otherwise. Both the House and Senate bills provided for the creation of a study panel to make recommendations on various issues relating to DBS regulation. According to the committee reports, the study panels were to submit recommendations on, among other things, "methods and criteria for selecting programming for [the set-aside] channels that avoid conflicts of interest and the exercise of editorial control by the DBS service provider."⁶ If Congress had intended that allocation of the set-aside capacity be on a "first come, first served" basis, there would have been no need for a study panel to recommend methods for selection of programming.⁷ Ultimately, the conference committee removed the provision for a study panel and provided instead that the set-aside capacity should be made available "to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission." 1992 Cable Act, Section 25(b)(3).⁸

because such a locally-oriented "soap box" would be a dubious use of a national technology.

Moreover, unlike the cable leased access statute (see 47 U.S.C. § 632(d), (e)), the DBS statute does not expressly prescribe judicial and administrative remedies for persons aggrieved by the failure to make reserved capacity available. This suggests that Congress did not envision that programmers would be able to assert an absolute right to be carried on the DBS set-aside capacity.

⁶ S. Rep. No. 102-92, at 92; H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 125 (1992).

⁷ A "first come, first served" approach would essentially amount to a common carrier obligation on the DBS provider. However, nothing in the DBS legislative history suggests that Congress intended to impose such common carriage obligations. To the extent the legislative history touches on this subject at all, it suggests that the Commission was not to take steps that would transform DBS providers into common carriers. See S. Rep. No. 102-92, at 92; H.R. Rep. No. 102-628, at 124 ("The Committee does not intend for the FCC, in formulating any additional public interest obligations, to impose retroactively common carrier status on any DBS system not regulated as a common carrier at the time such regulations are enacted.").

⁸ The conference committee also (a) added the current "editorial control" sentence, and (b) eliminated a provision defining "public service uses" that had appeared in the House bill and substituted a list of entities that qualify as "national educational programming suppliers" eligible to use the set-aside capacity.

Thus, the statute delegates to the Commission the duty to decide on the appropriate methods for selecting programming for the set-aside capacity, within the limitations established in the statute. The Commission should not simply import criteria from another statutory scheme governing a very different technology. Rather, it should choose an approach that is tailored both to the overall policies underlying the 1992 Cable Act and to the unique characteristics of the DBS technology. These considerations do not support a "first come, first served" approach. Rather, at least at the outset, they argue in favor of permitting DBS providers, where demand exceeds supply of the set-aside capacity, to make the initial selection among qualified "national educational program suppliers."⁹

Section 2 of the 1992 Cable Act states that it is the policy of Congress to "promote the availability to the public of a diversity of views and information," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability." 1992 Cable Act, Section 2(b)(1), (2). Allowing DBS providers to select among the group of qualified programmers described in the statute would be far more consistent with reliance on the marketplace than imposing a "first come, first served" regime.

In addition, the national character of DBS dictates a selection principle other than "first come, first served." DBS has a national footprint, and Congress envisioned that the set-aside capacity would carry programming with national appeal.¹⁰ The local "soap box" approach that may be appropriate for cable leased access channels

⁹ At least at this stage, it does not appear that permitting DBS providers to select among qualified programmers is likely to result in abuses. Congress has described specifically in the statute the categories of programmers that are entitled to use the set-aside capacity. Unless the Commission chooses to expand these categories (which we believe would be contrary to congressional intent), there will be clear constraints on the choices made by DBS providers for the set-aside capacity. Moreover, because (unlike the situation under the cable leased access statute) commercial programmers are not eligible to use the DBS set-aside capacity, there is less reason to expect that a DBS provider would discriminate against certain programmers for anticompetitive reasons. If experience eventually showed that DBS providers were selecting programmers for the set-aside capacity in a manner that undermined congressional intent underlying the set-aside provisions, the Commission could adopt a different approach.

¹⁰ Congress used the term "national educational programming suppliers" to describe the entities qualified to use the set-aside capacity. 1992 Cable Act, Section 25(b)(3), (5)(B) (emphasis added).

would be inappropriate for a national DBS service. Congress clearly created the set-aside capacity with the expectation that it would be used to carry valuable educational programming that would provide significant benefits for the American public. A "first come, first served" approach would likely defeat this expectation. This approach could fill the set-aside capacity with a collection of fragmented programming segments reflecting individualized interests that may or may not appeal to a national audience.¹¹ The result would be to turn the set-aside capacity into an unwatched wasteland, rather than the vital educational resource that Congress anticipated. Allowing DBS providers to make the initial selection among qualified programmers based on what is likely to appeal to a broad DBS audience is more likely to result in successful set-aside programming, thereby realizing Congress's goals for the set-aside capacity.¹²

In our earlier filings, we expressed the view that there should not be an undue delay in the effective date of the DBS regulations. However, the Commission should provide for a sufficient phase-in period so that DBS providers and qualified programmers can negotiate mutually satisfactory carriage agreements and prepare for distribution. Based on the recent experience of PBS, it appears that a phase-in period of between six and nine months would provide the parties with a reasonable amount of

¹¹ In particular, it is unlikely that the set-aside capacity could be used effectively for instructional purposes (e.g., through carriage of substantial blocks of high quality programming with nationwide appeal) if the "first come, first served" regime were adopted.

¹² While a "first come, first served" regime may appear to offer the advantage of administrative simplicity, there would undoubtedly be many issues that would need to be resolved in connection with this approach. Among other things, it would be necessary for the Commission to decide what steps a programmer would need to take in order to obtain priority to use the set-aside capacity, whether negotiation of a satisfactory carriage agreement would be a prerequisite to obtaining such priority, and when, if ever, a programmer with limited appeal to the DBS provider's audience could be ousted in favor of others behind it in line. Ultimately, relying on DBS providers to select among qualified programmers is likely to be a simpler and more equitable approach.

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time to negotiate and execute carriage agreements and begin distribution of new services designed for the set-aside capacity.


Respectfully submitted,



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